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EMPEROR v. PHILIP RANGEL

*Broomfield J.*

mere vulgar abuse, and the question, therefore, arises whether the applicant can be said to have had an intention to insult within the meaning of section 504.

Now there is some authority for holding that words which do not amount to more than vulgar abuse may nevertheless amount to insult within the meaning of this section. In the case of *Girish Chunder Mitter* v. *Jatadhari Sadukhan*[1] a Full Bench of the Calcutta High Court had to consider the question whether the mere use of abusive language such as *sala*, *haramzada*, *soor*, *baper-beta* etc. was actionable irrespective of special damage. The majority of the Court found that such language was not actionable. But all the learned Judges appear to have been of opinion that it would form a foundation for a criminal prosecution under section 504, and in fact the person who had used the abusive language in that case had been convicted under that section. However, as the learned Chief Justice says, bad language which is meaningless can only be regarded as insulting if the circumstances make it so. Even if there was in this case a technical offence under section 504, it is clearly not a case in which the criminal Courts should have been approached. I think the circumstances are covered by the provisions of section 95, and that therefore the accused is entitled to be acquitted.

*Rule made absolute.*

B. G. R.

(1) (1899) 26 Cal. 653.

## CRIMINAL REVISION.

*Before Sir John Beaumont, Chief Justice, and Mr. Justice Broomfield.*

1931
*November 26.*

P. X. D'SOUZA, APPLICANT (ORIGINAL ACCUSED) *v.* EMPEROR.*

*Criminal Procedure Code (Act V of 1898), section 362, sub-section (4)—Presidency Magistrate—Right to refuse to record evidence—Revision—High Court.*

Under section 362, sub-section (4) of the Criminal Procedure Code, 1898, a Presidency Magistrate may, if he likes, record evidence but his right to refuse to do

*Criminal Application for Revision No. 295 of 1931.

so is, under that sub-section, absolute and is not subject to revision by the High Court.

*Emperor* v. *Harischandra*,[1] disapproved.

CRIMINAL APPLICATION for Revision against the decision of D. N. D. Khandalawala, Presidency Magistrate, Third Court, Bombay.

The facts are stated in the judgment.

*G. S. Talpade*, for the accused.

*P. B. Shingne*, Government Pleader, for the Crown.

BEAUMONT, C. J. :—This is an application in revision against a conviction of the accused by the Presidency Magistrate, Third Court, for an offence under section 4 (*a*) of the Prevention of Gambling Act. The accused was fined Rs. 100.

The first point taken on behalf of the accused by Mr. Talpade is that although this is a case in which no appeal lies, nevertheless, the learned Magistrate ought to have recorded the evidence, and that without a record of the evidence the conviction ought not to be upheld. Section 362 of the Criminal Procedure Code provides that in every case in which an appeal lies the evidence shall be recorded in the manner specified. Then in sub-section (*4*) it is provided that in cases other than those specified in sub-section (*1*), that is to say, in cases in which an appeal does not lie, it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge. That exception to the general rule was no doubt inserted in order to save the time of the Presidency Magistrate, and one effect of it is that in cases in which the provision is acted upon and applications are subsequently made in revision, this Court is always in the difficulty that it has no record of the evidence. Mr. Talpade agrees that the learned Magistrate was not bound to record the evidence but he refers us to a case of *Emperor* v. *Harischandra*[1] in support of his proposition

[1] (1907) 10 Bom. L. R. 201.

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that the Magistrate ought in fact to have recorded the evidence. In that case the Court did undoubtedly say this. It refers to section 362, and in discussing the section says (p. 202) :—

"No doubt the section lays down that except in certain cases the Magistrate shall take down evidence in the manner prescribed thereby, but that does not mean that in the cases excepted he can act arbitrarily and record nothing by way of evidence. The exception gives him merely a discretion to take down the evidence or not; in other cases to which the exception does not apply he is bound to record the evidence. But the discretion, like all discretionary powers, should be exercised judicially in a reasonable spirit and not arbitrarily. For instance, in cases of petty offences such as 'nuisances,' or what are called in Police parlance 'morning cases,' there may be no necessity to record any evidence. But in a case of this kind, where an educated man holding a comparatively respectable status in life is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to come up to this Court in revision and satisfy it that the conviction is wrong."

With all respect to the learned Judges who decided that case, it seems to me that in the passage I have read they were usurping the functions of the Legislature. Section 362 is perfectly plain; it says that in cases which are not appealable it shall not be necessary for a Presidency Magistrate to record the evidence. There is no distinction drawn between what the learned Judges refer to as "morning cases" and any other cases. Nor is any distinction drawn between charges against people occupying a respectable status in life and people who occupy some other status. Nor in terms has any discretion been conferred upon the Magistrate. It is no doubt true that in one sense he has a discretion, because it is not illegal for him to record evidence if he likes to do so. But his right to refuse to record evidence is in my opinion absolute, and as long as the case falls within the cases excepted under section 362 (*4*), the Magistrate is not bound to record the evidence, and this Court has no jurisdiction to require him to do what the statute says it is not necessary for him to do. If he likes to record the evidence, that is another matter: and probably if he was hearing a case which involved a question of serious

consequence to the accused. and the accused asked him to make a record of those portions of the evidence on which he wished to rely on an application in revision, the Magistrate would in a proper case comply with that request. But in my opinion the exercise of any such discretion would be *ex gratia*, and not subject to review in this Court.

It is to be observed that in 1907 when the case of *Emperor* v. *Harischandra*[1] was decided the wording of section 362 of the Criminal Procedure Code was in different terms to those in which it is now expressed. But the decision has been acted upon to my knowledge in more recent cases, and I think it desirable to express the view that the decision was not justified by the terms of the Code, either as it existed then or as it now exists. This Court is not justified in following a decision which is opposed to the plain words of a statute.

With regard to the merits of the case we have got to accept the learned Magistrate's finding of fact as correct, since we have got no record of the evidence and cannot check it, and the finding is that the Police employed a bogus punter to make a bet with the accused and gave him a marked coin and that the marked coin was found on a raid of the accused's premises in his till. We held in a recent case[2] that a marked coin proved to have been used for the purpose of making a bet was an instrument of gaming, and that being so, the shop of the accused became a common gaming house within section 4 (*a*) of the Act. The conviction must, therefore, be upheld and rule discharged.

BROOMFIELD, J. :—I agree.

*Rule discharged.*

J. G. R.

[1] (1907) 10 Bom. L. R. 201.
[2] (1931) *Emperor* v. *Pyarilal Gokulprasad* ante p. 192.